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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

TETYANA NAZARUK,, Plaintiff, v. eBAY, INC.; ACE COINS, Defendants.	**DECLARATION OF ALLYSON WILLOUGHBY** Case No. 2:06CV00242 The Honorable Dale A. Kimball

I, Allyson Willoughby, declare as follows:

1. I am an attorney in the Legal Department at eBay Inc. ("eBay"). I have personal knowledge of the following facts and, if called upon to testify, I could and would testify competently thereto.

2. eBay operates an online marketplace on which "users" (i.e., individuals who register to use eBay's services) may list items they wish to sell and through which potential buyers may purchase items from third parties.

Dockets.Justia.com

3. In order to buy or sell on eBay, individuals must register with eBay. The registration process requires a potential user to complete a registration form and electronically submit the form to eBay. As part of the registration process, the potential user is required to review the eBay's User Agreement, which contains the terms and conditions that govern the relationship between eBay and its users. The potential user accepts the User Agreement by affirmatively clicking on a button that states "I Accept." Users who do not click the "I Accept" button are not permitted to complete the registration process.

4. eBay's User Agreement contains a dispute resolution provision requiring that any dispute between a user and eBay be resolved by a court located in Santa Clara County, California. Attached as Exhibit A is a true and correct copy of eBay's User Agreement downloaded from its website.

5. One of the services offered by eBay on its website is the "Feedback Forum." This section of the website allows users to post comments about other users with whom they have conducted transactions. eBay offers the "Feedback Forum" in order to facilitate a safer buying and selling environment.

I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true and correct.

Dated: June 6, 2006

Allyson Willoughby

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June 2006, I mailed a true and correct copy of the foregoing **DECLARATION OF ALLYSON WILLOUGHBY**, postage prepaid, to:

Tetyana Nazaruk
274 W. 200 S. Apt. 43
Salt Lake City, UT 84101

Sharon L. Astin

EXHIBIT A

Your User Agreement

The following describes the terms on which eBay offers you access to our services.

Introduction

Welcome to eBay. By using the services available from the domain and sub-domains of www.ebay.com (the "Site") you are agreeing to the following terms, including those available by hyperlink (the "Agreement" or "User Agreement") with eBay Inc. and the general principles for the web sites of our subsidiaries and international affiliates. If you reside outside of the United States, you are contracting with eBay International AG. If you have any questions, please refer to the Help section on the Site.

Before you may become a member of eBay, you must read and accept all of the terms and conditions in, and linked to, this User Agreement and the Privacy Policy. We strongly recommend that, as you read this User Agreement, you also access and read the linked information. By accepting this User Agreement, you also agree that your use of other eBay branded web sites will be governed by the User Agreement and Privacy Policy posted on those web sites.

This Agreement is effective on February 1st, 2006 for current users, and upon acceptance for new users. The previous amendment to this Agreement was effective for all users on May 25th, 2003.

Using eBay

While using the Site, you will not:

- post content or items in an inappropriate category or areas on the Site;
- violate any laws, third party rights, or our policies such as the Prohibited and Restricted Items policies;
- use the Site if you are not able to form legally binding contracts, are under the age of 18, or are temporarily or indefinitely suspended from our Site;
- fail to deliver payment for items purchased by you, unless the seller has materially changed the item's description after you bid, a clear typographical error is made, or you cannot authenticate the seller's identity;
- fail to deliver items purchased from you, unless the buyer fails to meet the posted terms, or you cannot authenticate the buyer's identity;
- manipulate the price of any item or interfere with other user's listings;
- circumvent or manipulate our fee structure, the billing process, or fees owed to eBay;
- post false, inaccurate, misleading, defamatory, or libelous content (including personal information);
- take any action that may undermine the feedback or ratings systems (such as displaying, importing or exporting feedback information off of the Site or for using it for purposes unrelated to eBay);

- transfer your eBay account (including feedback) and User ID to another party without our consent;
- distribute or post spam, chain letters, or pyramid schemes;
- distribute viruses or any other technologies that may harm eBay, or the interests or property of eBay users;
- copy, modify, or distribute content from the Site and eBay's copyrights and trademarks; or
- harvest or otherwise collect information about users, including email addresses, without their consent.

Abusing eBay

eBay and the Community work together to keep the site working properly and the Community safe. Please report problems, offensive content, and policy violations to us.

eBay's Verified Rights Owner (VeRO) program works to ensure that listed items do not infringe upon the copyright, trademark or other rights of third parties. If you believe that your rights have been violated, please notify our VeRO team through our Verified Rights Owner (VeRO) Program and we will investigate.

Without limiting other remedies, we may limit, suspend, or terminate our service and user accounts, prohibit access to our website, remove hosted content, and take technical and legal steps to keep users off the Site if we think that they are creating problems, possible legal liabilities, or acting inconsistently with the letter or spirit of our policies. We also reserve the right to cancel unconfirmed accounts.

Fees and Services

Joining eBay and bidding on listed items is free. We do charge fees for using other services, such as listing items. When you list an item or use a service that has a fee you have an opportunity to review and accept the fees that you will be charged based on our Fees schedule, which we may change from time to time. Changes to that Policy are effective after we provide you with at least fourteen days' notice by posting the changes on the Site. We may choose to temporarily change the fees for our services for promotional events (for example, free listing days) or new services, and such changes are effective when we post the temporary promotional event or new service on the Site.

Unless otherwise stated, all fees are quoted in U.S. Dollars. You are responsible for paying all fees and applicable taxes associated with the Site in a timely manner with a valid payment method. If your payment method fails or your account is past due, we may collect fees owed using other collection mechanisms. (This includes charging other payment methods on file with us, retaining collection agencies and legal counsel, and for accounts over 180 days past due, deducting the amount owed from your PayPal account balance.)

Content License

When you give us content, you grant us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise the copyright, publicity, and database rights (but no other rights) you have in the content, in any media known now or in the future. (We need these rights to host and display your content.)

Liability

You will not hold eBay responsible for other users' actions or inactions, including things they post. You acknowledge that we are not a traditional auctioneer. Instead, the Site is a venue to allow anyone to offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of pricing formats and venues, such as stores, fixed price formats and auction-style formats. We are not involved in the actual transaction between buyers and sellers. We have no control over and do not guarantee the quality, safety or legality of items advertised, the truth or accuracy of listings, the ability of sellers to sell items, the ability of buyers to pay for items, or that a buyer or seller will actually complete a transaction.

We do not transfer legal ownership of items from the seller to the buyer, and nothing in this agreement shall modify the governing provisions of California Commercial Code § 2401(2) and Uniform Commercial Code § 2-401(2), under which legal ownership of an item is transferred upon physical delivery of the item to the buyer by the seller. Unless the buyer and the seller agree otherwise, the buyer will become the item's lawful owner upon physical receipt of the item from the seller, in accordance with California Commercial Code § 2401(2) and Uniform Commercial Code § 2-401(2). Further, we cannot guarantee continuous or secure access to our services, and operation of the Site may be interfered with by numerous factors outside of our control. Accordingly, to the extent legally permitted, we exclude all implied warranties, terms and conditions. We are not liable for any loss of money, goodwill, or reputation, or any special, indirect, or consequential damages arising out of your use of our Site. Some jurisdictions do not allow the disclaimer of warranties or exclusion of damages, so such disclaimers and exclusions may not apply to you.

Regardless of the previous paragraph, if we are found to be liable, our liability to you or to any third party is limited to the greater of (a) the total fees you paid to us in the 12 months prior to the action giving rise to the liability, and (b) $100.

Release

If you have a dispute with one or more users, you release us (and our officers, directors, agents, subsidiaries, joint ventures and employees) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, arising out of or in any way connected with such disputes. If you are a California resident, you waive California Civil Code §1542, which says: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Access and Interference

The Site contains robot exclusion headers. Much of the information on the Site is updated on a real-time basis and is proprietary or is licensed to eBay by our users or third parties. You agree that you will not use any robot, spider, scraper or other automated means to access the Site for any purpose without our express written permission.

Additionally, you agree that you will not:

- take any action that imposes or may impose (in our sole discretion) an unreasonable or disproportionately large load on our infrastructure;
- copy, reproduce, modify, create derivative works from, distribute, or publicly display any content (except for Your Information) from the Site without the prior expressed written permission of eBay and the appropriate third party, as applicable;
- interfere or attempt to interfere with the proper working of the Site or any activities conducted on the Site; or
- bypass our robot exclusion headers or other measures we may use to prevent or restrict access to the Site.

Privacy

We do not sell or rent your personal information to third parties for their marketing purposes without your explicit consent. We use your information only as described in the eBay Privacy Policy. We view protection of users' privacy as a very important community principle. We store and process your information on computers located in the United States that are protected by physical as well as technological security devices. You can access and modify the information you provide us and choose not to receive certain communications by signing-in to your account. We use third parties to verify and certify our privacy principles. For a complete description of how we use and protect your personal information, see the eBay Privacy Policy. If you object to your Information being transferred or used in this way please do not use our services.

Indemnity

You will indemnify and hold us (and our officers, directors, agents, subsidiaries, joint ventures and employees), harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your breach of this Agreement, or your violation of any law or the rights of a third party.

No Agency

No agency, partnership, joint venture, employee-employer or franchiser-franchisee relationship is intended or created by this Agreement.

Notices

Except as explicitly stated otherwise, legal notices shall be served on eBay's national registered agent (in the case of eBay) or to the email address you provide to eBay during the registration process (in your case). Notice shall be deemed given 24 hours after email is sent, unless the sending party is notified that the email address is invalid. Alternatively, we may give you legal notice by mail to the address provided during the registration process. In such case, notice shall be deemed given three days after the date of mailing.

Resolution of Disputes

If a dispute arises between you and eBay, our goal is to provide you with a neutral and cost effective means of resolving the dispute quickly. Accordingly, you and eBay agree that we will resolve any claim or controversy at law or equity that arises out of this Agreement or our services (a "Claim") in accordance with one of the subsections below or as we and you otherwise agree in writing. Before resorting to these alternatives, we strongly encourage you to first contact us directly to seek a resolution by going to http://pages.ebay.com/help/new/customer-support.html. We will consider reasonable requests to resolve the dispute through alternative dispute resolution procedures, such as mediation or arbitration, as alternatives to litigation.

- **Law and Forum for Disputes** - This Agreement shall be governed in all respects by the laws of the State of California as they apply to agreements entered into and to be performed entirely within California between California residents, without regard to conflict of law provisions. You agree that any claim or dispute you may have against eBay must be resolved by a court located in Santa Clara County, California, except as otherwise agreed by the parties or as described in the Arbitration Option paragraph below. You agree to submit to the personal jurisdiction of the courts located within Santa Clara County, California for the purpose of litigating all such claims or disputes.
- **Arbitration Option** - For any claim (excluding claims for injunctive or other equitable relief) where the total amount of the award sought is less than $10,000, the party requesting relief may elect to resolve the dispute in a cost effective manner through binding non-appearance-based arbitration. In the event a party elects arbitration, they shall initiate such arbitration through an established alternative dispute resolution ("ADR") provider mutually agreed upon by the parties. The ADR provider and the parties must comply with the following rules: a) the arbitration shall be conducted by telephone, online and/or be solely based on written submissions, the specific manner shall be chosen by the party initiating the arbitration; b) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and c) any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

- **Improperly Filed Claims** - All claims you bring against eBay must be resolved in accordance with this Resolution of Disputes Section. All claims filed or brought contrary to the Resolution of Disputes Section shall be considered improperly filed. Should you file a claim contrary to the Resolution of Disputes Section, eBay may recover attorneys' fees and costs up to $1000, provided that eBay has notified you in writing of the improperly filed claim, and you have failed to promptly withdraw the claim.

Additional Terms

The following policies are part of this Agreement and provide additional terms and conditions related to specific services offered on the Site:

- **Outage Policy** - http://pages.ebay.com/help/policies/everyone-outage.html
- **Prohibited, Questionable & Infringing Item Policy** - http://pages.ebay.com/help/policies/items-ov.html
- **Board Usage Policy** - http://pages.ebay.com/help/policies/everyone-boards.html
- **Listing Policy** - http://pages.ebay.com/help/policies/listing-ov.html
- **Investigations**- http://pages.ebay.com/help/tp/programs-investigations.html
- **Real Estate Policy** - http://pages.ebay.com/help/policies/real-estate.html
- **Reviews and Guides** - http://pages.ebay.com/help/policies/ia/rev_guide.html
- **eBay Groups Guidelines** - http://pages.ebay.com/help/policies/group-guidelines.html

Each of these policies may be changed from time to time. Changes take effect when we post them on the Site. When using particular services on the Site, you are subject to any posted policies or rules applicable to services you use through the Site, which may be posted from time to time. All such policies or rules are hereby incorporated into this Agreement.

General

eBay Inc., is located at 2145 Hamilton Ave., San Jose, CA 95125. If you reside outside of the United States and registered on this Site, the services are offered by eBay International AG, located at Helvetiastrasse 15/17, 3005, Bern, Switzerland. If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced. In our sole discretion, we may assign this Agreement in accordance with the Notices Section. Headings are for reference purposes only and do not limit the scope or extent of such section. Our failure to act with respect to a breach by you or others does not waive our right to act with respect to subsequent or similar breaches. We do not guarantee we will take action against all breaches of this Agreement.

We may amend this Agreement at any time by posting the amended terms on the Site. Except as stated elsewhere, all amended terms shall automatically be effective 30 days after they are initially posted on the Site. Additionally, we will notify you through the

Site's message center tools. This Agreement may not be otherwise amended except in a writing signed by you and us. This Agreement sets forth the entire understanding and agreement between us with respect to the subject matter hereof. The following Sections survive any termination of this Agreement: Fees and Services (with respect to fees owed for our services), Release, Content License, Liability, Indemnity and Resolution of Disputes.

You may report complaints to the Complaint Assistance Unit of the Division of Consumer Services of the California Department of Consumer Affairs by contacting them in writing at 400 R Street, Sacramento, CA 95814, or by telephone at (800) 952-5210.
